

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY	)	
d/b/a Ameren Illinois,	)	Docket No. 12-0001
Petitioner	)	
	)	
Rate MAP-P Modernization Action Plan –	)	
Pricing Filing	)	

**AMEREN ILLINOIS COMPANY’S  
MOTION TO STRIKE IMPROPER “CROSS-EXAMINATION”  
FROM THE HEARING TRANSCRIPT**

Ameren Illinois Company d/b/a Ameren Illinois (“AIC”), pursuant to 83 Ill. Adm. Code § 200.190, respectfully requests that the Administrative Law Judges (“ALJs”) strike the portion of the hearing transcript reflecting the examination of AG witness Michael L. Brosch by counsel for IIEC (Tr. 405, line 17 – 408, line 12) as improper under the Illinois Code of Civil Procedure, the Commission’s Rules of Practice and the Illinois Rules of Evidence. In support of this motion, AIC states as follows:

1. On January 3, 2012, AIC filed its proposed performance-based formula rate tariff, Rate MAP-P, and supporting direct testimony. On April 12, 2012, intervening parties the AG and IIEC filed the direct testimony of AG witness Michael L. Brosch and IIEC witness Stephen M. Rackers, respectively. (AG/AARP Ex. 1.0 (Brosch Dir.); IIEC Ex. 2.0 (Rackers Dir).)

2. In their direct testimony, both Mr. Brosch and Mr. Rackers made the same recommendation with respect to the treatment of AIC’s Energy Assistance Charges (“EAC”) for the purpose of determining its cash working capital requirement. Specifically, both Mr. Brosch and Mr. Rackers recommend a zero revenue lag for EAC. (See AG/AARP Ex. 1.0, pp. 31-33; IIEC Ex. 2.0, pp. 5-6). Both witnesses also alternatively recommend, if the Commission assigns

a positive revenue lag to EAC, that the expense lead for EAC be increased. (Id.) Accordingly, the AG and IIEC's positions on this issue are aligned.

3. An evidentiary hearing was held in this matter from June 20 to June 22, 2012. At hearing, Mr. Brosch was called as a witness on behalf of the AG. (Tr. 402-04.) Thereafter, counsel for IIEC briefly "cross-examined" Mr. Brosch regarding his EAC-related recommendation. (Tr. 405-08.) Counsel for AIC noted an initial objection to such "cross-examination" as "friendly" (Tr. 405), and the ALJs directed the record to be held open, pending review of the transcript, for further objection (Tr. 408, 622-23, 645). Based on that transcript review, AIC now moves to strike the referenced hearing testimony of Mr. Brosch.

4. The subject "cross-examination" solicited testimony which, at best, is not adverse to IIEC's position on this issue. The examination began by simply reiterating Mr. Brosch's position. (Tr. 405, line 19 – 406, line 8.) The examination went on to discuss *AIC's* position, not Mr. Brosch's. It concluded that, with respect to AIC's position that it has pass through taxes in hand for only four days, AIC did not "take account of the amounts collected in the same month that the bills went out." (Tr. 408.)

5. Neither Mr. Brosch nor Mr. Rackers made this point in testimony. Thus, the only purpose of the "cross-examination" was to elicit additional points from a compliant witness, and bolster the record on this issue outside of the established schedule, without opportunity for AIC to respond. To the extent that IIEC perceived a flaw in AIC's position on the EAC, the proper course would have been to cross-examine AIC's witness on this issue, Mr. Heintz. IIEC did cross-examine Mr. Heinz and could have raised this particular issue with him, but did not. (See generally Tr. 191-97.) This "cross-examination" of Mr. Brosch was therefore improper and should be stricken from the record.

6. Section 2-1102 of the Illinois Code of Civil Procedure permits cross-examination of *adverse* parties. 735 ILCS 5/2-1102. Related, Section 200.265 of the Commission's Rules of Practice provides: "*Adverse* parties and their employees and agents may be called upon to testify in the manner contemplated by Section 2-1102 of the Code of Civil Procedure." 83 Ill. Adm. Code § 200.625 (emphasis added). AIC is aware of no rule that permits cross-examination of *non-adverse* parties.

7. Here, the AG and IIEC are not adverse regarding their proposed treatment of EAC in the cash working capital calculation. (In fact, they are not adverse with respect to any issue in the case. (See Tr. 405 (ALJ Albers and counsel for AIC acknowledging the same).)) Rather, the recommendations of those parties on the issue are precisely aligned. Therefore, IIEC's examination of Mr. Brosch constituted improper cross-examination. See, e.g., Griffin v. Subram, 238 Ill. App. 3d 712, 720 (1st Dist. 1992) ("It is also improper for a party, during examination of an adverse witness, to endeavor to elicit evidence which goes to establish his own case."); Suich v. H & B Printing Machinery, Inc., 185 Ill. App. 3d 863, 876-77 (1st Dist. 1989) (finding improper and prejudicial cross-examination structured to put examining party's theory of the case before the jury); Horner v. Bell, 336 Ill. App. 581, 588 (2d Dist. 1949) ("[I]t is never permissible to put in ones [sic] own case on cross-examination.") As such, IIEC's cross-examination of Mr. Brosch, and the testimony solicited thereby, should be stricken from the evidentiary record. (See, e.g., Tr. 536-39 (sustaining objection that questions constituted improper friendly cross-examination and additional rebuttal testimony).)

8. That portion of the hearing transcript also should be stricken as cumulative. Illinois Rule of Evidence 403 permits the exclusion evidence the probative value of which is substantially outweighed by considerations of "needless presentation of cumulative evidence."

Ill. R. Evid. 403. See also Fed. R. Evid. 403 (to which the more recent Illinois rule is identical). Where examination of another party's witness is intended merely to duplicate the testimony of the examining party's witness, it is inadmissible under Rule 403 as cumulative evidence. See United States v. Walker, 910 F. Supp. 861, 863 (N.D.N.Y. 1995) ("Looking solely at the government's expressed intention to call Frangipani and Dillon as ballistics experts who, it believes, will duplicate the testimony of the government's expert, and therefore buttress the conclusions of the government's expert, the Court holds that such testimony is simply cumulative and inadmissible under Rule of Evidence 403."). The apparent purpose of IIEC's "cross-examination" of Mr. Brosch was simply to buttress the position of IIEC's own witness related to the treatment of EAC in AIC's cash working capital calculation. For this reason as well, IIEC's counsel's "cross-examination" of Mr. Brosch, and the testimony solicited thereby, was improper and should be stricken from the evidentiary record.

WHEREFORE, AIC respectfully requests that its Motion be granted and that the ALJs strike page 405, line 17 through page 408, line 12 of the hearing transcript—that portion reflecting the examination of AG witness Mr. Brosch by counsel for IIEC—as improper under the Illinois Code of Civil Procedure, the Commission's Rules of Practice and the Illinois Rules of Evidence.

Dated: July 9, 2012

Respectfully submitted,

Ameren Illinois Company d/b/a Ameren  
Illinois

*/s/ Albert D. Sturtevant*

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Mark A. Whitt  
Christopher T. Kennedy  
WHITT STURTEVANT LLP  
PNC Plaza, Suite 2020  
155 East Broad Street  
Columbus, Ohio 43215  
(614) 224-3911  
whitt@whitt-sturtevant.com  
kennedy@whitt-sturtevant.com

Albert D. Sturtevant  
Rebecca L. Segal  
WHITT STURTEVANT LLP  
180 N. LaSalle, Suite 1822  
Chicago, IL 60601  
(312) 251-3017  
(312) 251-3019  
sturtevant@whitt-sturtevant.com  
segal@whitt-sturtevant.com

Christopher W. Flynn  
Attorney at Law  
PO Box 11015  
Chicago, IL 60611  
cwflynnlaw@gmail.com

Edward C. Fitzhenry  
Matthew R. Tomc  
AMEREN SERVICES COMPANY  
One Ameren Plaza  
1901 Chouteau Avenue  
St. Louis, Missouri 63166  
(314) 554-3533  
(314) 554-4014 (fax)  
efitzhenry@ameren.com  
mtomc@ameren.com

**CERTIFICATE OF SERVICE**

I, Albert D. Sturtevant, an attorney, certify that on July 9, 2012, I caused a copy of the foregoing Motion to Strike Improper “Cross-Examination” from the Hearing Transcript to be served by electronic mail to the individuals on the Commission’s Service List for Docket 12-0001.

/s/ Albert D. Sturtevant

Attorney for Ameren Illinois Company d/b/a  
Ameren Illinois